Alexis De Tocqueville 1835 Democracy in America

Judicial Power In The United States And Its Influence On Political Society

I have thought it essential to devote a separate chapter to the judicial authorities of the United States, lest their great political importance should be lessened in the reader's eyes by a merely incidental mention of them. Confederations have existed in other countries beside America, and republics have not been established upon the shores of the New World alone; the representative system of government has been adopted in several States of Europe, but I am not aware that any nation of the globe has hitherto organized a judicial power on the principle now adopted by the Americans. The judicial organization of the United States is the institution which a stranger has the greatest difficulty in understanding. He hears the authority of a judge invoked in the political occurrences of every day, and he naturally concludes that in the United States the judges are important political functionaries; nevertheless, when he examines the nature of the tribunals, they offer nothing which is contrary to the usual habits and privileges of those bodies, and the magistrates seem to him to interfere in public affairs of chance, but by a chance which recurs every day.

When the Parliament of Paris remonstrated, or refused to enregister an edict, or when it summoned a functionary accused of malversation to its bar, its political influence as a judicial body was clearly visible; but nothing of the kind is to be seen in the United States. The Americans have retained all the ordinary characteristics of judicial authority, and have carefully restricted its action to the ordinary circle of its functions. The first characteristic of judicial power in all nations is the duty of arbitration. But rights must be contested in order to warrant the interference of a tribunal; and an action must be brought to obtain the decision of a judge. As long, therefore, as the law is uncontested, the judicial authority is not called upon to discuss it, and it may exist without being perceived. When a judge in a given case attacks a law relating to that case, he extends the circle of his customary duties, without however stepping beyond it; since he is in some measure obliged to decide upon the law in order to decide the case. But if he pronounces upon a law without resting upon a case, he clearly steps beyond his sphere, and invades that of the legislative authority.

The second characteristic of judicial power is that it pronounces on special cases, and not upon general principles. If a judge in deciding a particular point destroys a general principle, by passing a judgment which tends to reject all the inferences from that principle, and consequently to annul it, he remains within the ordinary limits of his functions. But if he directly attacks a general principle without having a particular case in view, he leaves the circle in which all nations have agreed to confine his authority, he assumes a more important, and perhaps a more useful, influence than that of the magistrate, but he ceases to be a representative of the judicial power.

The third characteristic of the judicial power is its inability to act unless it is appealed to, or until it has taken cognizance of an affair. This characteristic is less general than the other two; but, notwithstanding the exceptions, I think it may be regarded as essential. The judicial power is by its nature devoid of action; it must be put in motion in order to produce a result. When it is called upon to repress a crime, it punishes the criminal; when a wrong is to be redressed, it is ready to redress it; when an act requires interpretation, it is prepared to interpret it; but it does not pursue criminals, hunt out wrongs, or examine into evidence of its own accord. A judicial functionary who should open proceedings, and usurp the censorship of the laws, would in some measure do violence to the passive nature of his authority.

The Americans have retained these three distinguishing characteristics of the judicial power; an American judge can only pronounce a decision when litigation has arisen, he is only conversant with special cases, and he cannot act until the cause has been duly brought before the court. His position is therefore perfectly similar to that of the magistrate of other nations; and he is nevertheless invested with immense political power. If the sphere of his authority and his means of action are the same as those of other judges, it may be asked whence he derives a power which they do not possess. The cause of this difference lies in the simple fact that the Americans have acknowledged the right of the judges to found their decisions on the constitution rather than on the laws. In other words, they have left them at liberty not to apply such laws as may appear to them to be unconstitutional.

I am aware that a similar right has been claimed – but claimed in vain -by courts of justice in other countries; but in America it is recognized by all authorities; and not a party, nor so much as an individual, is found to contest it. This fact can only be explained by the principles of the American constitution. In France the constitution is (or at least is supposed to be) immutable; and the received theory is that no power has the right of changing any part of it. In England the Parliament has an acknowledged right to modify the constitution; as, therefore, the constitution may undergo perpetual changes, it does not in reality exist; the Parliament is at once a legislative and a constituent assembly. The political theories of America are more simple and more rational. An American constitution is not supposed to be immutable as in France, nor is it susceptible of modification by the ordinary powers of society as in England. It constitutes a detached whole, which, as it represents the determination of the whole people, is no less binding on the legislator than on the private citizen, but which may be altered by the will of the people in predetermined cases, according to established rules. In America the constitution may therefore vary, but as long as it exists it is the origin of all authority, and the sole vehicle of the predominating force.

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Whenever a law which the judge holds to be unconstitutional is argued in a tribunal of the United States he may refuse to admit it as a rule; this power is the only one which is peculiar to the American magistrate, but it gives rise to immense political influence. Few laws can escape the searching analysis of the judicial power for any length of time, for there are few which are not prejudicial to some private interest or other, and none which may not be brought before a court of justice by the choice of parties, or by the necessity of the case. But from the time that a judge has refused to apply any given law in a case, that law loses a portion of its moral cogency. The persons to whose interests it is prejudicial learn that means exist of evading its authority, and similar suits are multiplied, until it becomes powerless. One of two alternatives must then be resorted to: the people must alter the constitution, or the legislature must repeal the law.

The political power which the Americans have entrusted to their courts of justice is therefore immense, but the evils of this power are considerably diminished by the obligation which has been imposed of attacking the laws through the courts of justice alone. If the judge had been empowered to contest the laws on the ground of theoretical generalities, if he had been enabled to open an attack or to pass a censure on the legislator, he would have played a prominent part in the political sphere; and as the champion or the antagonist of a party, he would have arrayed the hostile passions of the nation in the conflict. But when a judge contests a law applied to some particular case in an obscure proceeding, the importance of his attack is concealed from the public gaze, his decision bears upon the interest of an individual, and if the law is slighted it

is only collaterally. Moreover, although it is censured, it is not abolished; its moral force may be diminished, but its cogency is by no means suspended, and its final destruction can only be accomplished by the reiterated attacks of judicial functionaries. It will readily be understood that by connecting the censorship of the laws with the private interests of members of the community, and by intimately uniting the prosecution of the law with the prosecution of an individual, legislation is protected from wanton assailants, and from the daily aggressions of party spirit. The errors of the legislator are exposed whenever their evil consequences are most felt, and it is always a positive and appreciable fact which serves as the basis of a prosecution.

I am inclined to believe this practice of the American courts to be at once the most favorable to liberty as well as to public order. If the judge could only attack the legislator openly and directly, he would sometimes be afraid to oppose any resistance to his will; and at other moments party spirit might encourage him to brave it at every turn. The laws would consequently be attacked when the power from which they emanate is weak, and obeyed when it is strong. That is to say, when it would be useful to respect them they would be contested, and when it would be easy to convert them into an instrument of oppression they would be respected. But the American judge is brought into the political arena independently of his own will. He only judges the law because he is obliged to judge a case. The political question which he is called upon to resolve is connected with the interest of the suitors, and he cannot refuse to decide it without abdicating the duties of his post. He performs his functions as a citizen by fulfilling the precise duties which belong to his profession as a magistrate. It is true that upon this system the judicial censorship which is exercised by the courts of justice over the legislation cannot extend to all laws indiscriminately, inasmuch as some of them can never give rise to that exact species of contestation which is termed a lawsuit; and even when such a contestation is possible, it may happen that no one cares to bring it before a court of justice. The Americans have often felt this disadvantage, but they have left the remedy incomplete, lest they should give it an efficacy which might in some cases prove dangerous. Within these limits the power vested in the American courts of justice of pronouncing a statute to be unconstitutional forms one of the most powerful barriers which has ever been devised against the tyranny of political assemblies.